Filed 7/28/09 Claudia G. v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLAUDIA G.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES AGENCY,

Real Parties in Interest.

G041825

(Super. Ct. No. DP016403)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge orders of the Superior Court of Orange County, James Patrick Marion, Judge, and Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Deborah A. Kwast, Public Defender; Frank Ospino, Assistant Public Defender, Stacy Roark and Paul DeQuattro, Deputy Public Defenders, for Petitioner.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie Agin, Deputy County Counsel, for Real Party in Interest.

Law Office of Harold LaFlamme for the Minor.

* * *

Claudia G. petitions for relief from the order of the juvenile court removing her son, Diego, from her custody and denying her reunification services. She also claims the juvenile court erred in failing to provide a full adversary hearing on the claim of official information privilege asserted by the coroner and the police department to materials she requested during discovery. We find no error and deny the petition.

FACTS

One-year-old Diego was placed into protective custody on December 14, 2007, after his two-month-old baby sister was brought to an emergency room in full cardiac arrest. She died the next day. Tests showed "multiple subdural hematomas on the surface and the inside of the brain." The treating physician stated the injury "would require a significant force and there was no evidence of external trauma." Child abuse was suspected. Diego was placed with his godmother, Y.C.

The mother, the father, Diego, and the baby lived in a room they rented in a three bedroom house in Santa Ana. The mother told the emergency response social worker "she had fed the [baby] a bottle in the morning, burped her, then wrapped her tightly in a blanket and laid her on the bed. [S]he went into the kitchen to prepare breakfast and heard the child coughing. [W]hen she went into the room[,] the child had the blanket over her head. The mother stated she saw the child was blue and not breathing so she took her by the shoulders, lifted her and shook her to revive her. She demonstrated how she shook the child and it was a mild shaking. The parents stated the

father was in the bathroom and the child, Diego, was with the mother during the incident."

The notes made by the emergency room doctor, Kenneth Kim, stated: "Mother reports that the child was in her usual state of good health until on the day of admission. At 7:30 in the morning, the mother reports that she went to change the diaper of the baby and child appeared normal. At 8 o'clock, mother was going in and out of the room from the bathroom to the bedroom. Her mother finally finished her duties and then came down to sit and feed the baby. Mother then reports that the baby was slipped under the blanket. The child looked exceeding pal[e]. The child also did not appear to be responding in any significant way. . . . [¶] By the time 911 arrived, the child was apneic and asystolic."

The mother stated that Ivan G. was the father of Diego and the deceased baby. She also had a seven-year-old daughter, Megan, whose father was Eddie P. The mother separated from Megan's father when Megan was quite young; she began using alcohol and illegal drugs, including marijuana and "crack." "She initially was using on occasion, but eventually her frequency increased to daily use, when she had money." When Megan was two years old, the mother left her with the maternal grandparents, "as she was no longer capable of caring for her daughter." The mother ultimately entered Victory Outreach, where she lived for a year while she got sober. She told the social worker she had been sober for three years. The mother reported she had not seen Megan for two years and had not spoken to her for over one year. Before that, she saw Megan "once in awhile."

Following an autopsy, the baby's death was ruled a homicide. "The cause of death is blunt force trauma to the back of the head, resulting in bleeding into the brain." No police reports or any other information could be released because the investigation into the homicide was ongoing. Both parents' attorneys advised their

clients not to talk with the social worker about the circumstances surrounding the baby's death.

Pending the jurisdiction hearing, the mother's counsel served subpoenas duces tecum on the Santa Ana Police Department and the Orange County Sheriff-Coroner, seeking the production of the investigative materials in the homicide case. The subpoenas claimed the production was "necessary to thoroughly and completely investigate and defend the mother in her current dependency case." The police department and the coroner moved for an in camera review of the materials, claiming they were subject to the official information privilege (Evid. Code, § 1040).

The juvenile court conducted an in camera review on February 20, 2008, the transcript of which was sealed. The court ordered certain records released to the mother's counsel but upheld the privilege as to the autopsy photographs, crime scene photographs, tapes of 911 calls, witness interviews, crime scene investigation report, investigator's case notes, the police department reports, the baby's medical records, and the Coroner's case notes. The juvenile court found the release of the privileged information would "compromis[e] the investigation and potentially have a chilling effect on witnesses or provid[e] information to suspects currently under investigation." The mother requested an adversary hearing on the privileged materials, which the court conducted. After the adversary hearing, the court ordered the release of the autopsy photographs and the 911 tapes.

The jurisdiction hearing began in January 2009. The court admitted 12 SSA reports prepared between January and December 2008. The mother told the social worker that she had tripped while holding the baby two days before the incident that prompted the 911 call. The mother said the baby's head hit the wall when she tripped, and the baby was fussy after that. The Medical Director of the Child Abuse Services Team (CAST), Sandra Murray, opined that the tripping incident was "not likely to create sufficient force to cause the head injury. While short falls onto hard surfaces can rarely

cause linear skull fracture, this fracture has elements indicating that there was a greater force involved. The skull fractures from short falls are usually on the side of the skull, not the back where this fracture is. Separation of the sutures requires greater force than that from a short fall onto a hard surface. There was no damage noted on the wall where the mother said [the baby] hit her head. Wallboard is not a hard surface like that found on floors. [¶] The head trauma led to a sequence of events, which resulted in her death. The bronchopneumonia was the end result of the head and brain injury, which was the result of blunt force trauma. . . . [¶] The history provided by the mother does not adequately explain the injuries found in [the baby]. The most likely etiology of the head trauma is nonaccidental."

The social worker reported she explained to the mother that SSA would be recommending no reunification services in part because the mother failed to obtain medical care for the baby. "The undersigned asked if she did not believe the child needed medical care, intentionally withheld medical care or consciously chose not to obtain medical care for [the baby]. The undersigned explained that it is difficult to understand why she did not take the infant to the doctor or hospital if she suspected that something was wrong. At this point, [the mother] stated, 'I was afraid.' The undersigned explained that this line of conversation [could] no longer go on as it will likely involve the details of the incident. As the undersigned continued to discuss the Social Services recommendation to the Court and the reasons supporting this recommendation, the mother spontaneously commented that she was afraid that they would take her children away."

Megan told the social worker the mother had told her "she will come in the middle of the night and take her to Guatemala. The child expressed fear that her mother would come and take her away." The mother denied making such a statement. Later, Megan told the social worker the mother "whispered into her ear that she shouldn't have

told the undersigned about their previous conversation and that it is Megan's fault that the mother is now going to go to jail."

The mother visited Megan and Diego regularly; she continued to test negative for drugs and participate in individual counseling.

At the hearing, Dr. Murray testified the baby died of a combination of things starting with the head trauma which caused very significant brain injury, which led to her not breathing well and her heart stopping. The coroner listed the ultimate cause of death as bronchial pneumonia, which would take "at least 24 hours" to develop. Dr. Murray opined that "the head trauma probably significantly affected her breathing and respiratory status allowing fluids to accumulate in the lungs." Her head injuries would have caused symptoms that "anyone who is taking care of her" would notice. It was "very unlikely" the baby would have fed normally after the injuries. Dr. Murray testified there was a "very high probability" that the baby's injuries were nonaccidental. She also testified timely medical care could have prevented the pneumonia.

The doctor who performed the autopsy, Dr. Aruna Singhania, testified she found a skull fracture about eight centimeters long at the back of the baby's head; the fracture could only have been caused by "a lot of force." She testified symptoms from this head trauma would be exhibited "within a few hours." The bronchopneumonia could develop within two to 24 hours.

The mother testified on the day of the incident, she woke up early to feed the baby because she had to take her roommate's four children to school. The baby acted normally. She left the baby with the father and was gone about 45 minutes. When she returned, the father was standing at the front door waiting for her, which she thought was strange. She then went into the kitchen to fix breakfast, where she made eggs and oatmeal and tea for her roommate. She then took food into her family's bedroom for herself, Diego and the father. When she sat down on the sofa, the father told her to "be careful because the child's there, the baby's there." She looked and saw a blanket. "I

lifted the blanket and saw that the child was under the blanket and that she did not have any color in her skin." The mother became hysterical and picked the baby up and shook her "to see if she would open her eyes or if she would move or cry."

As amended, the petition alleged that Diego's mother and father "physically abused the child's two-month-old sibling . . . . [The sibling] sustained nonaccidental, fatal injuries, caused by severe blunt force trauma to the head, while in the sole and primary care of the child's mother and alleged father." The petition further alleged that the parents' explanations of the injuries "are inconsistent with the type of injuries sustained" and "the parents neglected to obtain medical care for the [sibling], which was a causal factor in the [sibling's] death." Diego was at risk for abuse if he remained in his parents' care "as it is unknown at this time who caused the injuries to the child's sibling, . . . who died from her injuries in the family's home, while under the care and supervision of the mother and alleged father." The juvenile court found the allegations of the amended petition true on February 9, 2009 and found that Diego was subject to the court's jurisdiction under Welfare and Institutions Code section 300, subdivision (a), (b) and (f).[1]

The disposition hearing commenced on March 19, 2009. At the conclusion, the court removed Diego and Megan from parental custody because their sibling died from "nonaccidental blunt force trauma inflicted on her while she was in the care of her mother and father," the parents failed to obtain prompt medical care, and both parents remain suspects in an ongoing police homicide investigation. In addition, mother deserted Megan, failed to provide clothing or other necessities, and had not spoken to Megan for one and one-half years at the time of the baby's death. The court denied reunification services because the mother "has caused the death of another child through abuse" and because "Diego and Megan were adjudicated dependents as a result of severe

[1] All statutory references are to the Welfare and Institutions Code unless otherwise designated.

physical abuse or harm to a sibling or half sibling by a parent." The court found reunification services would not benefit Diego based on the same factors that supported his removal from parental custody.

DISCUSSION

Denial of Reunification Services

The mother does not appeal the juvenile court's findings that Diego is a person described under section 300, subdivisions (a) [substantial risk of serious physical harm], (b) [failure to protect], and (f) [parent caused death of another child through abuse or neglect]. But she does contend the juvenile court erred in denying her reunification services under section 361.5, subdivisions (b)(4) and (b)(6).

Those sections provide: "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (4) That the parent or guardian of the child has caused the death of another child through abuse or neglect. . . . [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of . . . the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian . . . , and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian."

The mother's confusing contentions apparently boil down to this: There was no substantial evidence that she, not the father, abused the baby or that she knew or should have known about the abuse or the baby's need for medical care. She relies on the version of events surrounding the baby's death given in her testimony at the jurisdiction hearing. She contends there is no evidence to contradict her explanation that she left the baby in good health with the father while she took her roommate's children to school and that she discovered the baby's injuries when she returned and immediately called 911.

The mother's initial versions of the events surrounding the death did not involve her leaving the baby with the father. Her early reports were that she either fed and/or changed the baby early in the morning, at which time she was acting normally, then found the baby blue and not breathing a short time later. She also told authorities she had tripped while holding the baby a few days before, hitting her head against the wall. Her most recent version was that she left the baby with the father and discovered the injuries when she returned.

None of these versions are consistent with the baby's injuries. There was evidence that the baby suffered a severe blow to the back of the head, which affected her breathing and led to pneumonia. Symptoms from such a blow would have been quickly apparent to her caretakers. There was also evidence that the baby's condition when 911 was called would have taken between two and 24 hours to develop. This evidence supported the court's conclusion that the mother knew of the baby's injuries – either because she inflicted them, knew that the father inflicted them, or observed the obvious symptoms – and failed to obtain medical care.

The mother argues section 361.5, subdivision (b)(4) requires behavior more culpable than mere neglect; it requires behavior that meets the standard of criminal negligence. But the statute says no such thing. Before 1997, subdivision (b)(4) of section 361.5 required that the parent must have been *convicted* of causing the death of another child through abuse or neglect to be denied reunification services. The requirement of conviction was eliminated in 1997 so that the subdivision now requires only that the parent has *caused* the death of another child through abuse or neglect. This amendment is generally understood to have expanded the scope of the subdivision to maximize the protection of children. (*Mardardo F. v. Superior Court* (2008) 164 Cal.App.4th 481, 490-491.) The juvenile court correctly determined the mother had caused the death of the baby through abuse and neglect.

The mother contends the court erred in denying services under section 361.5, subdivision (b)(6), arguing that the court must specifically identify which parent inflicted severe physical harm to the child in order to deny services under that subdivision. But "where the child's . . . injuries were obvious to the child's caretakers and they failed to act, the court is not required to identify which parent inflicted the abuse by act and which parent inflicted the abuse by omission or consent." (*Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 852.) As we have pointed out, the mother either inflicted the injuries or failed to act after she found out about them. Either circumstance renders her culpable under subdivision (b)(6) of section 361.5.

We will affirm the juvenile court's denial of reunification services if it is supported by substantial evidence. (*Amber K. v. Superior Court* (2006) 146 Cal.App.4th 553, 560.) There is ample evidence to support the denial under either subdivision (b)(4) or subdivision (b)(6) of section 361.5.

Adversary Hearing re Official Information Privilege

The mother contends she was denied due process because the juvenile court did not did not conduct an item by item assessment during the adversarial hearing on the application of the official information privilege to her discovery requests. We disagree.

Evidence Code section 1040 provides that "[a] public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." (Evid. Code, § 1040, subd. (a)(2).)

In *Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036, this court held the juvenile court must hold an in camera review of items claimed to be subject to the official privilege by the public entity. "As to each item, the court must evaluate

petitioner's ""'necessity for disclosure in the interest of justice,'"" assessing 'the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means.' [Citation.]" (*Id.* at p. 1046.) Following the in camera review, the juvenile court must conduct an adversarial hearing """probing the information's relevance to the [petitioner], exploring with counsel the availability of other alternatives, and, if necessary, hearing testimony *voir dire*." [Citation.]' [Citations.]" (*Id.* at p. 1047.)

The mother argued below that when conducting the in camera review, the juvenile court should go through each item of requested discovery line by line and consider redaction or a protective order as an alternative method to the claim of privilege. For example, the mother's counsel urged the court to listen to all the tapes of the interviews and 911 calls, read every word of each report, and view all the autopsy photographs. We do not think such detail was necessary to protect the mother's interests.

After the in camera hearing, the court explained it was not releasing the autopsy photographs because "the investigation is not yet complete" and "[t]hey're waiting for a doctor to finish his analysis." The same reasoning applied to the coroner's report. Medical records could be obtained by subpoena directly from the hospital, a "tox request" was released after redaction. With respect to the police department records, the court reviewed a "2-inch notebook that the detective showed me plus numerous autopsy [and] crime scene photographs." The notebook contained witness interviews, crime scene investigative reports, tapes of 911 calls to the police and fire departments. The court also did not release them because the investigation was not yet completed.

At the adversarial hearing, the court heard argument from the mother's counsel, who went through the list of privileged items, and from counsel for the coroner and the police department. After argument, it decided to release the autopsy photographs and the tape of the mother's 911 calls. It indicated its willingness to consider releasing

more information if the circumstances changed. "[I]t's not a done deal completely. You could always come back, and you could always bring another motion."

The procedure complied with the spirit of *Michael P.* and the case on which it relied, *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, which require the trial court to avoid the "blanket application of the privilege to *all* of the items listed." (*Michael P. v. Superior Court*, *supra*, 92 Cal.App.4th at p. 1046.) The juvenile court here demonstrated that it balanced the mother's rights against those of the public entities. This is uniquely a trial court function, and we see no reason to disturb the conclusion. (*Id.* at p. 1047.)

Risk to Diego if Returned to the Mother

The mother claims because there is no evidence she was culpable in any fashion for the baby's death, there is no evidence Diego would be at risk in her care. As we have discussed, there is substantial evidence to support the juvenile court's conclusion that the mother caused the death of the baby through abuse or neglect. A fortiori, there is substantial evidence to support the court's conclusion that returning Diego to the mother would present "a substantial danger to [his] physical health, safety, protection, or physical or emotional well-being . . . ." (§ 361, subd. (c)(1).)

Best Interests of Diego

The mother acknowledges that she bears the burden of proving that providing reunification services would be in Diego's best interests notwithstanding the application of section 361.5, subdivisions (b)(4) and (b)(6). She argues she met that burden of proof by presenting evidence that she was employed, her drug tests were negative, her visits with Diego were positive, she performed well in counseling and classes, and she had never previously abused a child.

But the juvenile court found that reunification services would *not* be in Diego's best interests. Despite evidence that could, arguably, support a contrary conclusion, we must uphold the trial court's determination if supported by substantial

evidence. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 64-65.) There is substantial evidence here.

DISPOSITION

The petition is denied.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

IKOLA, J.